IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4698 OF 2007
AND
WRIT PETITION NO. 4407 OF 2007.

Mrs. Charu Kishor Mehta (W.P.No.4698/07)
Kishore Kirtilal Mehta (W.P.No.4407/07) ....Petitioners
V/s
Lilavati Kirtibai Medical Trust & Ors.... ....Respondents.

Mr.N.H.Seervai, Sr. Adv. i/by Mr.T.N.Tripathi & Co., Adv. For the petitioner (W.P.No.4698/07).

Mr.Mahesh Jethmalani with Mr.M.S.Doctor, Mr.Norruddin Dhila & Ms.Aaradhana Bhansali & Mr.Shane Sapeco i/by M/s.Hariani & Co. Adv. For the petitioner (W.P.No.4407/07).

Mr.Mahesh Jethmalani with Mr.M.S.Doctor, Mr.Norruddin Dhila & Ms.Aaradhana Bhansali & Mr.Shane Sapeco i/by M/s.Hariani & Co. Adv. For respondent Nos. 11, 12 & 13.

Mr.Rafiq Dada, Sr. Counsel with Mr.G.S.Godbole i/by M/s.Nankani & Associates for respondent No.1 in both the petitions.

Mr.Virag Tulzapurkar, Sr. Counsel with Mr.Bipin Saraf i/by M/s.M.K.Banatwala & Co., for respondent No.3 in both the petitions.

Mr.S.G.Aney, Sr. Counsel i/by M/s.Haresh Mehta & Co. for respondent No.4 in both the petitions.

Mr.P.K.Samdani, Sr. Counsel with Mr.C.S.Kapadia i/by Mr.M.G.Gawde for respondent No.10 in both the petitions.

CORAM: A.P.DESHPANDE, J.
6/9/07

PC:

The suit out of which these two writ petitions arise is filed by one

Mrs.Charu Kishor Mehta. The dispute in the suit relates to the administration of a Trust named Lilavati Kirtilal Mehta Medical Trust which administers the hospital by name Lilavati Hospital. The challenge in the suit is to a notice dated 27.4.06 issued for convening meeting of the trustees on 29.4.06. The plaintiff has sought a declaration that the resolution allegedly adopted in the meeting is illegal and void. Besides seeking said declaration other incidental reliefs are also claimed. The defendant No.11 in the suit is the husband of the plaintiff and defendants 12 and 13 are their children. The said defendants were impleaded by way of amendment to the plaint. The defendant No.11 filed his separate written statement whereas defendant Nos. 12 and 13 filed joint written statement. The defendants 11, 12 and 13 are supporting the plaintiff. The petitioner in Writ Petition No. 4407/07 is husband of the plaintiff/defendant No.11.

2. Writ petition No.4698/07 is directed against an order passed below Ex.40 dated 13.6.07 by the City Civil Court which goes to strike off that part of evidence in the affidavit of examination in chief of the plaintiff which according to the City Civil Court is outside the pleadings in the plaint. The City Civil Court partly allowed the application moved by the contesting defendants. Whereas Writ Petition No.4407/07 questions the legality and validity of the order dated 30.4.07 partly allowing the notice of motion moved by the contesting defendants and directing striking out paragraphs 4 to 31, 35 and 36 from written statement of defendant No.11 and paragraphs 4, 7, 11 and 12 from the written statement of defendant Nos. 12 and 13 on the ground that the plea set up and raised by the defendants is beyond the scope of the suit and traveles beyond the pleadings in the plaint. It is held by the impugned order that the paragraphs which have been ordered to be struck of go to enlarge the scope of the dispute.

3. Though this Court granted rule it declined to grant stay of the trial of the suit or operation of the order impugned. Aggrieved by refusal of stay the plaintiff in these very matters approached the Supreme Court. The Supreme Court heard the matter along with other connected matters and by its order dated 9.7.07 granted stay of the impugned orders in these two writ petitions. The Supreme Court while granting stay of the impugned orders observed that :

> "But we think that the stay of operation of the orders striking out portions of the written statements of defendant No.11, 12 and 13 and part of the chief-examination in the affidavit tendered by the plaintiff would be justified since in case the High Court were to accept the challenge to those orders of the trial court, it would mean that the witnesses will have to be recalled and questions put to them on those aspects now struck out to cover those aspects and this would inconvenience the trial. The consequence of granting a stay would only be that some irrelevant aspects are also covered in the examination of the witnesses. If the High Court were to dismiss the writ petitions, those portions can always be eschewed. By and large, which part of the evidence is to be discarded as being outside the pleadings is something that the court considers when it discusses the evidence."

It is thus clear that the Supreme Court with a view to facilitate the entire evidence being brought on record has granted stay to the impugned orders. The Supreme Court has further observed that at appropriate stage the evidence can be scrutinized and admissible evidence retained and inadmissible evidence rejected. I am informed that as yet evidence of the plaintiff has not concluded. It is thus imperative that the impugned order below Ex.40 cannot be permitted to be operated till the evidence of the plaintiff is over. So far as the impugn;ed order in writ

petition No.4407/07 is concerned the same also will have to be stayed so as to facilitate the evidence in the form of cross examination being brought on record touching the plea raised in paragraphs which are directed to be struck off, yet again with a view to enable the entire evidence being brought on record which can be scrutinized at the appropriate stage. Bearing this position in mind and having regard to the parameters of exercise of jurisdiction under Article 227 of the Constitution of India, I proceed to consider the challenge. I have gone through the paragraphs which have been directed to be struck off from the affidavit of examination in chief of the plaintiff so also paragraphs that are directed to be struck off from the written statement of defendants 11, 12 and 13 in the light of impugned orders. Learned counsel for the petitioner has in the first place submitted that no part of affidavit of examination in chief of the plaintiff travels beyond the pleadings. It is then submitted that evidence is not required to be pleaded but the evidence sought to be adduced in the form of affidavit must have its root in the pleadings. It is also contended that relevant evidence cannot be shut out in an attempt to adhere to procedure. The impugned orders are attacked on the ground that the same take a very pedantic view instead of pragmatic one. Learned counsel for the contesting respondents on the other hand have stoutly supported the impugned orders and justify the same.

4. While exercising jurisdiction under Article 227 of the Constitution of India, it is submitted by learned counsel for the respondents that this Court can only interfere with the impugned orders in case it is shown to be patently illegal or suffer from an error which is manifest and which results in miscarriage of justice. True it is, that all illegalities cannot be corrected while exercising jurisdiction under Article 227 of the Constitution of India. Patent illegality is one which is immediately

noticed and for which a deeper probe is not required to be made. Having regard to the nature of controversy i.e. as to whether plea taken in some of the paragraphs of written statement go to enlarge scope of suit itself require a deeper probe in the light of pleadings and evidence on record. Same is the position in regard to the order directing striking out some of the paragraphs from the affidavit of examination in chief. Having regard to the order passed by the Supreme Court which permits entire evidence to be brought on record the issues raised in this petition can be more advantageously considered in a regular appeal if filed questioning the correctness of the final judgment and decree to be passed by the City Civil Court. My attention is invited to the following observations made by the Supreme Court in its order referred to herein above which read thus:

> "By and large which part of evidence needs to be discarded as being outside the pleadings is something that the Court considers when it discusses the evidence."

Perusal of the impugned orders does not reveal any patent illegality being committed by the City Civil Court warranting interference in exercise of jurisdiction under Article 227 of the Constitution of India. It may so happen that on deeper probe being made an illegality may surface but then such illegalities cannot be interfered with at an interlocutory stage in 227 jurisdiction. As I do not find any patent illegality being committed by the trial Court I decline to interfere with impugned orders. However, having regard to the purpose sought to be achieved by the order passed by the Supreme Court I continue the stay of order passed below Ex.40 until the evidence of the plaintiff is over and I continue the stay of the impugned order in W.P.No.4407/07 until recording of entire evidence is over. Obviously this is done to enable the entire evidence being brought on record so that the Appellate Court can

scrutinize the same and take appropriate decision on the admissibility or inadmissibility thereof. Hence leaving all contentions raised in these petitions open to be agitated in a civil appeal which the plaintiff may be required to file, both the writ petitions are dismissed. Rule discharged.